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No. 81-2108

In the Supreme Court of the United States

OCTOBER TERM, 1981

JUAN CORCHADO,
PETITIONER,

v.

PUERTO RICO MARINE MANAGEMENT, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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Statement of the Case

Preliminary Statement

This is a case of discovery abuse and failure to prosecute which resulted in the dismissal of the action by the District Court. The petitioner, notwithstanding multiple orders from the Court, failed to answer interrogatories and failed to provide other discovery. A host of dilatory tactics were employed by the petitioner, including withdrawal of counsel, failure to appear at a pretrial conference and failure to appear at a

status conference before the trial judge. The District Court's order of dismissal was affirmed by the First Circuit Court of Appeals.

Counter-Statement of Facts

Petitioner's statement of facts is only marginally accurate, and certain omissions and inaccuracies give an unbalanced presentation of the events which led to the District Court's dismissal of the complaint. Respondent submits that the exposition of facts contained in the opinion of the Court of Appeals affirming dismissal, contains a complete and concise summary of relevant facts. The following clarifications are submitted to correct portions of the petitioner's statement of facts and to clarify certain inaccuracies:

1. At the taking of petitioner's deposition August 13, 1980, he was represented by attorney Wilfredo A. Geigel as well as by attorney Harry A. Ezratty who made the following statement for the record:

> "Mr. Ezratty: Yes.
>
> Let me, at this time, for the record, state that I am co-counsel with Wilfredo Geigel.
>
> I have not filed a formal appearance, but I will be filing one shortly.
>
> But, for the record, I am co-counsel.
>
> Mr. Brown: Okay.
>
> What other stipulation?
>
> Mr. Ezratty: That's it." (R. 71).[1]

2. At the status conference held November 20, 1980, in addition to granting the parties until January 16, 1981 to complete discovery and scheduling a pretrial conference for Jan-

[1] References are to the joint appendix to briefs filed before the Court of Appeals.

uary 23, 1981, the Court ordered plaintiff to answer all outstanding discovery by not later than December 1, 1980. (R. 72).

3. In light of petitioner's failure to provide discovery by December 1, 1980 as ordered by the Court, respondent filed on December 8, 1980 a motion to compel answers to interrogatories. Petitioner was given until December 17, 1980 to answer the outstanding discovery and was warned that sanctions might follow. (R. 85).

4. On December 23, 1980 petitioner's answers had still not been served and respondent moved for sanctions. Petitioner requested an additional term of 15 days to comply, which request was granted by the Court as a last extension and ordered that the pending discovery was to be answered by January 16, 1981. (R. 91).

5. As of the date of the pretrial conference, January 23, 1981, petitioner had still not served answers to the pending discovery.

6. At the pretrial conference, petitioner's co-counsel Geigel presented a motion for withdrawal of counsel, further indicating that Ezratty would continue with the case and was aware of the pendency of the pretrial and that Geigel intended to withdraw as counsel. Ezratty had prior knowledge of the scheduled pretrial conference, yet failed to appear. (R. 103).

7. On January 27, 1981, four days after the pretrial conference, petitioner served on respondent a set of answers to interrogatories.[2] Still unanswered were the answers to the supplemental interrogatories, answers to the request for production of documents and answers to supplementary interrogatories on the issues of unseaworthiness and negligence,

[2] Many of the responses given were objected to by letters to Messrs. Geigel and Ezratty dated January 28, 1981 pursuant to Rule 8(m) of the Rules of the United States District Court for the District of Puerto Rico. No further action as to these objections was taken by respondent in light of the dismissal of the case.

all of which had been propounded on July 7, 1980. Of the depositions which petitioner had indicated were necessary, only one was taken and a copy of the transcript was never served on counsel for respondent. Likewise, the information which petitioner stipulated would be provided at the taking of his deposition, was never produced.

8. At the hearing scheduled before the trial judge February 11, 1981, counsel for petitioner failed to appear.

Arguments

I. Dismissal Of The Complaint For Failure To Respond To Discovery And For Failure To Prosecute Was Appropriate Under The Circumstances Of The Case At Bar, And Such Action Did Not Require The Holding Of A Hearing Prior To Dismissal.

The facts in this case are not in dispute. There is no question that despite repeated orders to provide answers to all pending discovery, none was forthcoming. Nor is there any dispute that notwithstanding repeated promises to provide discovery, none were kept. It is also not disputed that warnings of sanctions went unheeded. There is likewise no dispute that Ezratty failed to appear at the pretrial conference despite full knowledge of the pendency of the same and the impending withdrawal of co-counsel Geigel. Finally, there is no dispute that counsel failed to appear at the conference scheduled before the trial judge.

Under these circumstances, dismissal pursuant to Federal Rule of Civil Procedure 41(b) for failure to prosecute, and pursuant to Federal Rule of Civil Procedure 37(b)(2)(C) for failure to respond to discovery was warranted. Petitioner now claims that a hearing was required prior to dismissal and that the failure to hold such a hearing was an abuse of discretion. There is no requirement that a hearing be held prior to dis-

missal for failure to prosecute or for failure to provide discovery. Nor is there such a requirement when, as in the case at bar, elements of both are joined.

This Court emphatically held in *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 633 (1961).

> Accordingly, when circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so or providing an adversary hearing before acting. Whether such an order can stand on appeal depends not on power, but whether it was within the permissible range of the Court's discretion.

Petitioner argues that the Court of Appeals erred in relying on the *Link* case, which involves dismissal for failure to prosecute under Rule 41(b), when presumably dismissal could only be sought pursuant to Rule 37(b)(2). Petitioner appears to suggest that the presence of one excludes the other. This erroneous assumption is unsupported in fact or law. The facts in this case show that not only was there a total failure to respond to discovery, but also a flagrant failure to prosecute. The failure to prosecute was manifest not only as a result of failures to participate in the preparation of discovery timetables and proposed pretrial orders, but also by failures to appear at the pretrial conference and the status conference. We submit that these are not isolated acts of excusable neglect but persistent failures for which no reasonable excuse is offered.

That petitioner was afforded ample opportunity to submit explanations for his conduct and present any mitigating elements, is evidenced by the flurry of motions for reconsideration, affidavits and other motions which were filed after the events which gave rise to the dismissal had run their course. Petitioner offers nothing that could have been brought to the Court's attention which would have required a hearing or

which has not been already presented. The order of the District Court dismissing the case carefully reviews all of the facts as they occurred and is clearly supported by the record. Under the circumstances, the dismissal by the District Court and affirmation by the First Circuit was appropriate. *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976).

The facts in this case do not support even a remote suggestion that failure to give discovery was as a result of inability to comply. *Societe Internationale, Etc.* v. *Rogers*, 357 U.S. 197 (1958). To the contrary, the record shows that discovery was repeatedly promised and was never forthcoming. Nor is this a case where it could reasonably be believed that petitioner did not understand the requirements of the orders to compel discovery. The question here presented is whether gross negligence or a series of episodes of nonfeasance, amounting to a total dereliction of professional responsibilities, warranted the imposition of the severest sanction. *Cine Forty-Second St. Theater* v. *Allied Artists*, 602 F.2d 1062, 1068 (2nd Cir. 1979); *Affanato* v. *Merrill Bros.*, 547 F.2d 138 (1st Cir. 1977).

The very cases which petitioner cites to suggest abuse of discretion in ordering dismissal of the case at bar are clearly distinguishable.[3] When compared factually to the present case, it is evident that the dismissal here was fully justified and supported by the record. In *Joplin* v. *Southwestern Bell Telephone Company*, 671 F.2d 1274 (10th Cir. 1982), unlike the case at bar, the Court found petitioner had made significant efforts to comply with the Court's pretrial instructions. In *Rogers* v. *Kroger Company*, 669 F.2d 317 (5th Cir. 1982) and in *E.E.O.C.* v. *Carter Carburetor Company*, 577 F.2d 43

[3] Each of the cases cited by petitioner as supporting a finding of abuse of discretion has been examined and the facts which made these distinguishable are set forth. The case which petitioner cites of *Nealy* v. *Transportacion Maritima Mexicana*, 630 F.2d 694 (9th Cir. 1980), is unavailable for review since a note at the page where the case should appear indicates that the same "was withdrawn from the bound volume at the request of the Court."

(8th Cir. 1978), it was noted that both sides had been responsible for delay and had used dilatory tactics. Here, we are faced with compounded delays and dilatory tactics by petitioner. There is no claim of impropriety or delay on the part of respondent and in fact no such claim is supported by the record.

In *Schenck* v. *Bear, Stearns and Co., Inc.*, 583 F.2d 58[4] (2nd Cir. 1978), there had been no prior prodding of the plaintiff by the Court to require the giving of discovery and new counsel appeared at the pretrial conference and indicated a willingness to go forward with the case pursuant to a proposed timetable. In the case at bar, not only were there repeated orders to give discovery and warnings to the petitioner that sanctions might follow, but also, co-counsel Ezratty failed to appear at the pretrial conference despite knowledge that one was scheduled and knowledge that co-counsel Geigel would seek to withdraw legal representation.

The case of *Butler* v. *Pearson*, 636 F.2d 526 (D.C. Cir. 1980), is likewise clearly distinguishable from the case at bar. In *Butler*, there was not properly a failure to obey the Court's directives since the answers, while untimely, were given within the period for completion of discovery. In fact the Court noted that dismissal was ordered eight days prior to the expiration of the deadline to complete discovery. Here, we are confronted, not with a simple failure to give timely discovery in a timely fashion. Repeatedly orders to give discovery were ignored, compounded by a complete failure to prosecute.

As can be seen, the suggestion by petitioner that the decision of the Court of Appeals in the case at bar is somehow in conflict with the standards and procedures which have been fashioned in other circuits is incorrect. Clearly, each of the cases cited by petitioner is distinguishable. The analysis made by the Court of Appeals in the case at bar, the finding that

[4] Improperly cited by petitioner as appearing at 585 F.2d 60.

there was no abuse of discretion, is thoroughly supported by the record and within the guidelines established by this Court in *Link* and *National Hockey League*.

II. The Fact That Petitioner Is A Seaman Does Not Entitle Him To Treatment Or Privileges Beyond Those Of Other Litigants.

Petitioner argues that since seamen are wards of the Court and have been held entitled to beneficent treatment, the District Court abused its discretion in dismissing this action. That seamen have been held entitled to beneficent treatment is not disputed. *Garrett* v. *Moore-McCormick*, 317 U.S. 239 (1942); *Bainbridge* v. *Merchants' and Miners' Transportation Co.*, 287 U.S. 278 (1932). That they are consequently immune from the application of Rule 37(d) and Rule 41(b), does not follow.

Petitioner seeks to distinguish the cases cited by the Court of Appeals which hold that petitioner is not entitled to special treatment which would effectively allow a different standard to be applied to seamen than to other litigants. Petitioner alleges that the Court of Appeals erred in applying the case of *Kenney* v. *California Tanker Company*, 381 F.2d 775 (3rd Cir. 1969) to the case at bar. Petitioner asserts that *Kenney* is distinguishable insofar as plaintiff—not counsel—had been held to blame for the failure to prosecute. An examination of *Kenney* shows that no such distinction was made. That petitioner would seek to shift blame to counsel for his present predicament and characterize himself as a "victim" of his attorney's conduct is, of course, not surprising. Petitioner's interpretation of the *Kenney* holding is erroneous.

But, as is painfully evident from the record, dismissal does not only result from petitioner's failure to prosecute, dismissal has also been properly affirmed in cases involving seamen where discovery is not given, as when interrogatories have

gone unanswered. *Lynn* v. *American Barge Lines Company*, 226 F.2d 934 (3rd Cir. 1955); *Milewski* v. *Schneider Transportation Co.*, 238 F.2d 397 (6th Cir. 1956); *Hastings* v. *Maritime Overseas Corporation*, 411 F.2d 1201 (3rd Cir. 1969); *Kelly* v. *United States*, 338 F.2d 328 (1st Cir. 1964).

Respondent submits that the dismissal by the District Court is fully supported by the record. Clearly, petitioner ignored repeated orders to provide discovery in a manner which shows flagrant bad faith on the part of petitioner that unnecessarily delayed proceedings. The dilatory tactics of counsel for petitioner demonstrates a total disregard for their responsibilities which merited the harsh penalty of dismissal.

Conclusion

In view of the foregoing, respondent respectfully submits that dismissal of the action was proper and requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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